**S ASHOK KANDIAH & ANOR** A

**v.**

**DATO' YALUMALLAI MUTHUSAMY & ANOR**

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-02-562-2009]
16 MARCH 2010 C

***TORT:*** *Defamation - Libel - Absolute privilege - Advocate & solicitor writing letter to court complaining about chambering student having misled court - Chambering student misleading and lying to court about his actual occupation - Whether letter published in connection with judicial* D *proceedings - Whether duty of advocate & solicitor to write the letter - Whether defence of absolute privilege established*

***TORT:*** *Defamation - Libel - Justification - Advocate & solicitor writing letter to court complaining about chambering student having misled court -* E *Chambering student misleading and lying to court about his actual occupation - Whether truth of contents of letter established - Whether defence of justification established*

***TORT:*** *Defamation - Libel - Fair comment - Advocate & solicitor writing letter to court complaining about chambering student having misled court -* F *Chambering student misleading and lying to court about his actual occupation - Whether letter constituted fair comment on a matter of public interest - Whether comment made in honest belief of its truth - Whether activated by malice - Whether defence of fair comment established*

G

***TORT:*** *Defamation - Libel - Qualified privilege - Advocate & solicitor writing letter to court complaining about chambering student having misled court - Chambering student misleading and lying to court about his actual occupation - Whether duty of advocate & solicitor to write the letter -* H *Whether improper motive in writing letter - Whether defence of qualified privilege established*

***TORT:*** *Defamation - Publication of letter - Whether defamatory - Advocate & solicitor writing letter to court complaining about chambering student having misled court - Chambering student misleading and lying to* I *court about his actual occupation - Defences - Truth - Justification - Absolute privilege - Qualified privilege - Whether established*

The 2nd defendant/2nd appellant firm ('the Firm') was retained by one Dato' Tan to commence legal proceedings against the 1st plaintiff/1st respondent for the recovery of a friendly loan. Civil proceedings were thus filed against the 1st plaintiff in the Sessions Court. The 1st plaintiff represented himself in the Sessions Court proceedings and applied to strike out the summons and statement of claim. The 1st defendant/1st appellant appeared as counsel on behalf of Dato' Tan. During hearing of the application on 13 August 1999, the 1st and 2nd plaintiffs were seated at the Bar table in the Sessions Court. The 2nd plaintiff was wearing the standard professional attire for counsel appearing in court. The 2nd plaintiff had completed his pupilage on 30 July 1999 and was waiting to be called to the Bar on 20 August 1999. However, this fact was not known to the 1st defendant or to the Sessions Court Judge. In the course of the 1st plaintiff's oral submissions, the 2nd plaintiff assisted the 1st plaintiff by handing over copies of authorities to the judge and the 1st defendant. During the hearing, the 1st defendant became curious as to the presence of the 2nd plaintiff and requested the judge to query the 2nd plaintiff as to his identity and to have his presence recorded since the 1st plaintiff was on record as acting in person. The 2nd plaintiff informed the judge that he was a clerk in the 1st plaintiff's office. The judge then directed him to vacate the Bar table. After the hearing, the 1st defendant checked with the Bar Council and found out that the 2nd plaintiff was stated in their records as a pupil in chambers. Thereafter, upon the 1st defendant's instruction, a staff of the Firm, one Mr Woodhull, telephoned the 1st plaintiff's office to ascertain the position of the 2nd plaintiff in the 1st plaintiff's office. One Ms Lee in the 1st plaintiff's office confirmed that no one by the name of the 2nd plaintiff worked there. The 1st defendant then wrote a letter ('the Impugned Letter') to the 1st plaintiff and copied same to the Sessions Court Judge, to place on record the events of 13 August 1999. The 1st defendant claimed in the Impugned Letter that the plaintiffs had knowingly misled the Court and/or lied to the court that the 2nd plaintiff was a clerk at the 1st plaintiff's office. The 1st defendant also stated that he was mindful to lodge a complaint with the court and the Bar Council on the 2nd plaintiff's conduct. The plaintiffs initiated a defamation/libel suit against the defendants as a consequence of the Impugned Letter. The High Court found in favour of the plaintiffs and awarded general damages in the sum of RM100,000 each and costs. Hence, this appeal by the defendants.

**Held (allowing the appeal with costs)**
**Per KN Segara JCA:**

**(1)** The trial judge had seriously misdirected himself on the facts in the context of the events that had transpired in the Sessions Court immediately before the Impugned Letter was written. The trial judge had not subjected the evidence before him to critical examination and evaluation as to whether the plaintiffs had in fact misled the Sessions Court Judge on 13 August 1999 as to the nature of the 2nd plaintiff's occupation on 13 August 1999. A serious miscarriage of justice had been occasioned by the trial judge in rejecting the pleaded defence of justification to the alleged libel contained in the Impugned Letter. (para 58)

**(2)** When justification is pleaded, the burden is on the defendants to show the court that they are justified in making the allegation. The trial judge failed to appreciate that on the evidence before him the "sting" in the Impugned Letter was fully justified. That the plaintiffs had knowingly misled the court as to the nature of the 2nd plaintiff's occupation on 13 August 1999 was patent and obvious from the facts. Most certainly, the 2nd plaintiff had misled the court (by his smart counsel's attire, seated at the Bar table confidently handing over authorities to the court and counsel) into believing that he was either a pupil in chambers or an advocate and solicitor. The situation was aggravated when he alleged his occupation was "kerani di pejabat Dato' Rama". (paras 70, 72 & 73)

**(3)** The trial judge failed to consider the affidavit of Lee Kwye Lan, who was listed as one of the plaintiffs' witness. She was, however, not called by the plaintiffs to testify and, the irresistible inference was that her evidence would have demolished the 2nd plaintiff's assertion to the Sessions Court Judge that he was a clerk at the 1st plaintiff's office. The trial judge also failed to consider the evidence of Mr. Woodhull, whose evidence, together with the witness statement of Lee Kwye Lan, would have established on a balance of probability, if not beyond reasonable doubt, that the 2nd plaintiff was not employed as a temporary clerk at the 1st plaintiff's office. (para 75)

**Per Abdul Malik Ishak JCA:**

**(1)** The Impugned Letter was: (i) published in connection with judicial proceedings; and (ii) an initiation by the defendants for sanctions to be imposed by the sessions court judge against the plaintiffs. Statements made in the course of judicial proceedings or statements contained in documents made in judicial proceedings are absolutely privileged. The words in the impugned letter were nothing more than a reiteration of the words spoken in court and published in the course of judicial proceedings. The first defendant wrote the impugned letter to place on record the events that transpired on 13 August 1999 as he believed that, as an officer of the court, he had a duty to do so and that by doing so he was merely discharging that duty. The impugned letter was protected by absolute privilege. (paras 6 & 12)

**(2)** Justification, or truth, is an absolute defence for an action in libel or slander. No action lies in regard to a statement which injures the reputation of another if that statement is true. The defence of justification should succeed because the defendants were able to establish that the plaintiffs had misled the sessions court judge about the 2nd plaintiff's occupation. (paras 23-24 & 30)

**(3)** As an officer of the court, the first defendant had an avowed duty to prevent the administration of justice from being imperilled and brought into disrepute. The first defendant honestly believed that the 2nd plaintiff was a pupil in chambers and not a clerk in the 1st plaintiff's office. The first defendant had no improper or indirect motive for publishing the impugned letter. He acted on an honest belief in the truth of the publication. He did not act with reckless indifference to the truth or falsity of the publication. As such, the learned High Court judge ought to have held that the defence of qualified privilege succeeded. (para 33)

**(4)** To succeed in the defence of fair comment, the defendants must show that the words are fair comment and not a statement of fact. The defendants too must show that there is a basis for the comment to the extent of indicating that what is being stated is fair comment. The defendants must also show that the comment is on a matter of public interest. The defence of fair comment should be invoked in favour of the

defendants for the following reasons: (i) the charges on which the alleged libel was based were true and the alleged libel was made fairly; (ii) the alleged libel constituted a comment and not a statement of fact; (iii) the alleged libel was made fairly even if only one of the charges had been proved to be true; (iv) the alleged libel was made by the first defendant in the honest belief that it was true; and (v) the alleged libel was not activated by malice. (paras 38-40)

***Bahasa Malaysia*** *Translation Of Headnotes*

Defendan kedua/perayu kedua firma ('firma') telah dibayar retainer oleh seorang yang bernama Dato' Tan untuk memulakan prosiding undang-undang terhadap plaintif pertama/responden pertama bagi mendapatkan kembali suatu pinjaman persahabatan. Prosiding sivil oleh itu difailkan terhadap plaintif pertama dalam mahkamah sesyen. Plaintif pertama mewakili dirinya dalam prosiding mahkamah sesyen dan memohon untuk membatalkan saman dan pernyataan tuntutan. Defendan pertama/perayu pertama hadir sebagai peguam bagi pihak Dato' Tan. Semasa pembicaraan permohonan pada 13 Ogos 1999, plaintif-plaintif pertama dan kedua duduk di meja Badan Peguam dalam mahkamah sesyen. Plaintif kedua memakai pakaian biasa profesional peguam yang menghadiri mahkamah. Plaintif kedua telah menghabiskan pelatihannya pada 30 Julai 1999 dan sedang menunggu untuk dipanggil ke Badan Peguam pada 20 Ogos 1999. Walau bagaimanapun, fakta ini tidak diketahui oleh defendan pertama atau oleh hakim mahkamah sesyen. Dalam perjalanan hujahan lisan plaintif pertama, plaintif kedua menolong plaintif pertama dengan menyerahkan salinan otoriti-otoriti kepada hakim dan defendan pertama. Semasa pembicaraan, defendan pertama ingin tahu tentang kehadiran plaintif kedua dan meminta hakim untuk menyoal plaintif kedua mengenai identitinya dan untuk kehadirannya direkodkan disebabkan plaintif pertama dicatatkan dalam rekod sebagai bertindak bersendirian. Plaintif kedua memberitahu hakim bahawa beliau adalah kerani dalam pejabat plaintif pertama. Hakim kemudiannya mengarahkannya untuk meninggalkan meja Badan Peguam. Selepas pembicaraan, defendan pertama memeriksa dengan Majlis Peguam dan mendapati bahawa plaintif kedua dinyatakan dalam rekod mereka sebagai pelatih dalam kamar. Selepas itu, menurut arahan defendan pertama, seorang kakitangan firma, yang bernama Encik Woodhull, menelefon pejabat plaintif pertama untuk menentukan kedudukan plaintif kedua di dalam pejabat plaintif pertama. Seorang yang bernama Cik Lee di dalam pejabat plaintif pertama mengesahkan bahawa tiada orang dengan nama plaintif

kedua yang bekerja di sana. Defendan pertama kemudiannya menulis surat ('surat yang dipertikaikan') kepada plaintif pertama dan menyalin yang sama kepada hakim mahkamah sesyen, untuk mencatatkan dalam rekod kejadian-kejadian pada 13 Ogos 1999. Defendan pertama mengatakan dalam surat yang dipertikaikan bahawa plaintif-plaintif telah dengan penuh kesedaran memperdaya mahkamah dan/atau menipu mahkamah bahawa plaintif kedua adalah seorang kerani di pejabat plaintif pertama. Defendan pertama juga menyatakan bahawa beliau harus membuat aduan dengan mahkamah dan Majlis Peguam mengenai kelakuan plaintif kedua. Plaintif-plaintif memulakan suatu guaman fitnah/libel terhadap defendan-defendan akibat dari surat yang dipertikaikan. Mahkamah Tinggi memutuskan untuk plaintif-plaintif dan mengaward gantirugi berjumlah RM100,000 setiap satu dan kos. Oleh yang demikian, rayuan semasa dibuat oleh defendan-defendan.

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh KN Segara HMR:**

**(1)** Hakim perbicaraan telah menyalaharahkan dirinya dengan serius berdasarkan fakta-fakta dalam konteks kejadian-kejadian yang terjadi dalam mahkamah sesyen sebaik sahaja sebelum surat yang dipertikaikan telah ditulis. Hakim perbicaraan tidak menimbangkan keterangan di hadapannya dengan kritikal tentang sama ada plaintif-plaintif telah sebenarnya memperdaya hakim mahkamah sesyen pada 13 Ogos 1999 mengenai sifat pekerjaan plaintif kedua pada 13 Ogos 1999. Sesuatu salah laksana keadilan telahpun dilakukan oleh hakim perbicaraan dalam menolak pembelaan justifikasi yang diplidkan terhadap libel yang dikatakan terkandung dalam surat yang dipertikaikan.

**(2)** Apabila justifikasi diplidkan, beban adalah di atas defendan-defendan untuk membuktikan kepada mahkamah bahawa mereka mempunyai alasan yang kuat dalam membuat pengataan tersebut. Hakim perbicaraan gagal menimbangkan bahawa berdasarkan keterangan di hadapannya "bisa" dalam surat yang dipertikaikan adalah berjustifikasi sepenuhnya. Ia adalah ketara dan nyata dari fakta-fakta bahawa plaintif-plaintif telah dengan penuh kesedaran memperdaya mahkamah mengenai sifat pekerjaan plaintif kedua pada 13 Ogos 1999. Pastinya, plaintif kedua telah memperdaya mahkamah (dengan pakaian peguam yang kemasnya, duduk di meja Badan Peguam dengan penuh keyakinan serta menyerahkan otoriti-otoriti kepada mahkamah dan peguam) untuk mempercayai bahawa beliau adalah sama

ada pelatih dalam kamar ataupun peguambela dan peguamcara. Situasi itu bertambah teruk apabila beliau mengatakan pekerjaannya adalah sebagai kerani di pejabat Dato' Rama.

**(3)** Hakim perbicaraan gagal menimbangkan afidavit Lee Kwye Lan, yang disenaraikan sebagai salah seorang saksi plaintif-plaintif. Beliau, walaupun begitu, tidak dipanggil oleh plaintif-plaintif untuk memberi keterangan dan, inferens yang tidak dapat disangkal adalah bahawa keterangannya dapat memusnahkan penegasan plaintif kedua kepada hakim mahkamah sesyen bahawa beliau adalah seorang kerani di pejabat plaintif pertama. Hakim perbicaraan juga gagal menimbangkan keterangan Encik Woodhull, di mana keterangannya, bersama dengan pernyataan saksi Lee Kwye Lan, dapat membuktikan atas imbangan kebarangkalian, jika tidak melampui keraguan munasabah, bahawa plaintif kedua tidak bekerja sebagai kerani sementara di pejabat plaintif pertama.

**Oleh Abdul Malik Ishak HMR:**

**(1)** Surat yang dipertikaikan telah: (i) diterbitkan berkenaan dengan prosiding kehakiman; dan (ii) suatu permulaan oleh defendan-defendan bagi sekatan dikenakan oleh hakim mahkamah sesyen terhadap plaintif-plaintif. Pernyataan-pernyataan yang dibuat dalam perjalanan prosiding kehakiman atau pernyataan-pernyataan yang dikandungi dalam dokumen-dokumen yang dibuat dalam prosiding kehakiman adalah keistimewaan mutlak. Perkataan-perkataan dalam surat yang dipertikaikan hanya merupakan pengataan semula perkataan-perkataan yang disebut dalam mahkamah dan diterbitkan dalam perjalanan prosiding kehakiman. Defendan pertama menulis surat yang dipertikaikan untuk mencatatkan dalam rekod kejadian-kejadian yang berlaku pada 13 Ogos 1999 kerana beliau mempercayai bahawa, sebagai seorang pegawai mahkamah, beliau mempunyai tanggungjawab untuk berbuat sedemikian dan dengan melakukan itu beliau hanya menyempurnakan tanggungjawabnya. Surat yang dipertikaikan dilindungi oleh keistimewaan mutlak.

**(2)** Justifikasi, atau kebenaran, adalah suatu pembelaan mutlak bagi tindakan dalam libel atau slander. Tiada tindakan berhubungan dengan suatu pernyataan yang menjejaskan reputasi seorang lagi jika pernyataan itu adalah benar. Pembelaan justifikasi sepatutnya berjaya kerana defendan-defendan dapat membuktikan bahawa plaintif-plaintif telah memperdaya hakim mahkamah sesyen tentang pekerjaan plaintif kedua.

**(3)** Sebagai pegawai mahkamah, defendan pertama mempunyai tanggungjawab yang diakui untuk menghalang pentadbiran keadilan dari dijejaskan dan mendapat nama buruk. Defendan pertama benar-benar percaya bahawa plaintif kedua adalah pelatih dalam kamar dan bukan seorang kerani dalam pejabat plaintif pertama. Defendan tidak mempunyai apa-apa motif tak wajar atau tak langsung untuk menerbitkan surat yang dipertikaikan. Beliau bertindak berdasarkan kepercayaan yang jujur dalam kebenaran penerbitan tersebut. Beliau tidak bertindak dengan tidak mengendahkan secara sembarangan kebenaran atau kepalsuan penerbitan tersebut. Oleh itu, hakim Mahkamah Tinggi sepatutnya memutuskan bahawa pembelaan perlindungan bersyarat berjaya.

**(4)** Untuk berjaya dalam pembelaan ulasan saksama, defendan-defendan mesti membuktikan bahawa perkataan-perkataan tersebut adalah ulasan saksama dan bukan pernyataan fakta. Defendan-defendan juga mesti membuktikan bahawa terdapat asas bagi ulasan hingga menunjukkan apa yang dinyatakan adalah ulasan saksama. Defendan-defendan juga mesti membuktikan bahawa ulasan itu adalah berkenaan dengan perkara yang melibatkan kepentingan awam. Pembelaan ulasan saksama seharusnya digunakan memihak kepada defendan-defendan untuk sebab-sebab berikut: (i) tuduhan-tuduhan atas mana libel yang dikatakan berdasar adalah benar dan libel yang dikatakan telah dibuat dengan adil; (ii) libel yang dikatakan merupakan suatu ulasan dan bukan suatu pernyataan fakta; (iii) libel yang dikatakan telah dibuat secara adil meskipun hanya satu dari tuduhan-tuduhan telah dibuktikan sebagai benar; (iv) libel yang dikatakan telah dibuat oleh defendan pertama dengan kepercayaan jujur bahawa ia adalah benar; dan (v) libel yang dikatakan tidak diaktifkan oleh niat jahat.

**Case(s) referred to:**

*Alexander v. The North Eastern Railway Co [1865] 6 B & S 340* ***(refd)***

*Barbaro v. Amalgamated Television Services Pty Limited [1984] NSW Lexis 2333* ***(refd)***

*Bottomley v. Brougham [1908] 1 KB 584* ***(refd)***

*Bruton v. Estate Agents Licensing Authority [1996] 2 VR 274* ***(refd)***

*Campbell v. Spottiswoode [1863] 122 ER 3 B & S 769* ***(refd)***

*Cooper v. Lawson [1838] QBD, Michaelmas Term 8 A & D 601* ***(refd)***

*Coopers & Lybrand v. Singapore Society of Accountants & Ors [1988] 1 LNS 60* ***(refd)***

*Egger v. Viscount Chelmsford & Ors [1965] 1 QB 248* ***(refd)***

*Fitzherbert v. Acheson [1921] NZLR 265* ***(refd)***

*Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1977] 3 LNS 2 HC*
*Henry Edmund Taaffe, Esq v. The Right Hon. William Downes, Lord Chief Justice of the Court of King's Bench in Ireland [1813] 15 ER 3 Moore* ***(refd)***
*Hercules v. Phease and Another [1994] 2 VR 411* ***(refd)***
*Horrocks v. Lowe [1975] AC 13* ***(refd)***
*Howden v. "Truth" And "Sportsman" Limited And Another [1937] 58 CLR 416* ***(refd)***
*Lange v. Australian Broadcasting Corporation [1997] 145 ALR 96* ***(refd)***
*Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC* ***(refd)***
*Lincoln v. Daniels [1962] 1 QB 237* ***(refd)***
*London Artists Ltd v. Littler, Grade Organisation Ltd v. Same, Associated Television Ltd v. Same, Grade v. Same [1969] 2 QB 375* ***(refd)***
*Meeran Leebaik Maullin & Anor v. J Mohamed Ismail Marican & The Straits Printing Works [1926] 2 MC 85* ***(refd)***
*Mowlds v. Fergusson [1939] 40 SR (NSW) 311* ***(refd)***
*Nevill v. Fine Arts and General Insurance Company, Limited [1895] 2 QB 156* ***(refd)***
*Oldfield v. Keogh [1941] 41 SR (NSW) 206* ***(refd)***
*Re Lilley; Ex parte Roney [1892] 61 LT 270* ***(refd)***
*Renouf v. Federal Capital Press of Australia Pty Ltd [1977] 17 ACTR 35* ***(refd)***
*Roberts v. Bass [2002] HCA 57* ***(refd)***
*Royal Aquarium And Summer And Winter Garden Society, Limited v. Parkinson [1892] 1 QB 431* ***(refd)***
*S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC* ***(refd)***
*Sutherland And Others v. Stopes [1925] AC 47* ***(refd)***
*Tse Wai Chun Paul v. Albert Cheng [2000] HKCFA 86* ***(refd)***
*Vernon v. Bosley (No 2) [1999] QB 18* ***(refd)***
*Webb v. Bloch [1928] 41 CLR 331* ***(refd)***
*Watt v. Longsdon [1930] 1 KB 130* ***(refd)***

**Legislation referred to:**
Defamation Act 1957, s. 9
Legal Profession Act 1976, ss. 12(2), 36(2)

**Other source(s) referred to:**
*Gatley on Libel and Slander,* 11th edn, pp 382, 385

*For the appellants/defendants - Porres P Royan (T Sudhar with him); M/s Shook Lin & Bok*
*For the respondents/plaintiffs - Dato' Ghazi Ishak (Nazeera Hanifa with him); M/s Ghazi & Lim*

*[Appeal from High Court, Kuala Lumpur; Civil Suit No: S3-23-82-1999]*

*Reported by Amutha Suppayah*

A

## JUDGMENT

**Abdul Malik Ishak JCA:**

**[1]** This is my supporting judgment to the judgment of my learned brother Nihrumala Segara MK Pillay, JCA. It is self evident that the words in the impugned letter written by the first defendant were a reiteration of the words spoken in the course of the proceedings on 13 August 1999 in the Kuala Lumpur sessions court. According to the first defendant, he wrote the impugned letter to place on record the events of 13 August 1999 as he believed that he had a duty to do so as an officer of the court and in the honest belief that the contents of the impugned letter were true.

**[2]** By sitting at the bar table (dressed in a white shirt, a tie and a black coat) and by assisting the first plaintiff in the course of his submissions before the sessions court judge, the second plaintiff, who was not a party to the proceedings, gave the appearance that he was an advocate and solicitor or a pupil in chambers.

**[3]** The contemporaneous documentary evidence, plainly and obviously support the defendants' case that the plaintiffs had informed the sessions court judge that the second plaintiff was a clerk in the office of the first plaintiff. The notes of evidence recorded by the sessions court judge at p. 330 of the appeal record at vol. 4 reinforces the defendants' case. It was recorded as follows:

P/P1 – Pohon record kehadiran kerani def
– En. Alvinthiren Nair a/L Onikandan Nair
– (720129-08-6067)
– Occ. Kerani di pejabat Dato Rama.

**[4]** To compound the matter further, the answers given by Ms. Lee Kwye Lan in her witness statement marked as D2 must invariably weaken, if not, destroy the plaintiffs' case. It is evident from the list of witnesses for the plaintiffs as seen at pp. 167 to 168 of the appeal record at vol. 2, the plaintiffs had intended, at the outset, to call Ms. Lee Kwye Lan as their witness. Yet she was not called as a witness by the plaintiffs.

**[5]** At the trial, the main defences raised by the defendants were:

(a) absolute privilege;

(b) justification;

(c) qualified privilege; and

(d) fair comment.

## The Defence Of Absolute Privilege

**[6]** The learned High Court judge erred in holding that the defence of absolute privilege raised by the defendants was devoid of merit bearing in mind that the impugned letter was:

(i) published in connection with judicial proceedings; and

(ii) an initiation by the defendants for sanctions to be imposed by the sessions court judge against the plaintiffs.

**[7]** Lopes LJ in *Royal Aquarium And Summer And Winter Garden Society, Limited v. Parkinson* [1892] 1 QB 431, CA, at 451 aptly said:

> The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies, whether against judges, counsel, witnesses, or parties for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will or anger against the person defamed.

**[8]** And according to the case of *Henry Edmund Taaffe, Esq. v. The Right Hon. William Downes, Lord Chief Justice of the Court of King's Bench in Ireland* [1813] 15 ER 3 Moore 35 at 47, it is immaterial whether such proceedings take place in open court or in private. It is also immaterial that the proceedings are of a final or preliminary character (*Bottomley v. Brougham* [1908] 1 KB 584 at 588) and whether they are conducted *ex parte* or *inter partes*.

**[9]** In short, absolute privilege attaches to statements made in the course of judicial proceedings. Indeed, *Gatley on Libel and Slander*, 11th edn, at p. 382 wrote that:

> No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice.

**[10]** The learned author continued to write at p. 385 in this way:

> The privilege will attach to any matter incidental to the proceedings 'practically necessary for the administration of justice.' That it is convenient is insufficient. However, with the exception of proofs of evidence of witnesses or inquiries in criminal cases, it is not enough that proceedings are contemplated: they must be actually on foot or the matter in issue must be an act which initiates them. In the case of proceedings of regular courts this is not likely to cause any difficulty since the initiation of the proceedings will involve a well-recognised formal step such as the issue of a claim form, but the matter may be more difficult in the case of other tribunals exercising functions of a judicial nature.

**[11]** It is now settled law that statements made in the course of judicial proceedings or statements contained in documents made in judicial proceedings are absolutely privileged (*Coopers & Lybrand v. Singapore Society of Accountants & Ors* [1988] 1 LNS 60; [1988] 3 MLJ 134 at pp. 136 to 137).

**[12]** In this appeal, the evidence adduced plainly shows that the words in the impugned letter were nothing more than a reiteration of the words spoken in court and published in the course of judicial proceedings. At para. 4 of their statement of claim as seen at p. 61 of the appeal record at vol. 1, the plaintiffs averred that the impugned letter "... concerning the plaintiffs in relation to their conduct in the proceeding at court 9 Kuala Lumpur sessions court summons case no: 7-52-19989-98 on 13 August 1999 ..." The evidence adduced further shows that the first defendant wrote the impugned letter to place on record the events that transpired on 13 August 1999 as he believed that, as an officer of the court, he had a duty to do so and that by doing so he was merely discharging that duty.

**[13]** According to *Vernon v. Bosley (No. 2)* [1999] QB 18, CA, all litigants, whether represented or not, owe an obligation not to mislead the court. And a breach of this onerous obligation could be dealt with by imposing any of the procedural sanctions available to the court, including the setting aside of a judgment so obtained. The other sanction would be that of contempt or if the falsehood is so grave and it is contained in the evidence, then perjury would be the ultimate sanction.

**[14]** According to *Hercules v. Phease and Another* [1994] 2 VR 411, the mere fact that the complaint may not lead to formal proceedings because of the interposition of some preliminary investigation and discretion does not necessarily mean that there is no absolute privilege. In the context of the present appeal, absolute privilege undoubtedly attaches to the impugned letter. There are no two ways about it.

**[15]** In *Lincoln v. Daniels* [1962] 1 QB 237, 256, Devlin LJ made the following observations germane to the occasion at hand:

> The rule of absolute privilege, as has so often been pointed out, has not been devised so as to protect malicious persons but to ensure that judges and others engaged in the administration of justice should be free from the fear of proceedings and 'the vexation of defending actions,' as Fry LJ put it in *Munster v. Lamb* 11 QBD 588, 607.

**[16]** It is ideal to remember that the legal consequence of absolute privilege is this. That whether the words are relevant or irrelevant, true or false, malicious or *bona fide*, the action must be regarded as baseless and frivolous (*Fitzherbert v. Acheson* [1921] NZLR 265, 269, SC).

**[17]** In *Re Lilley; Ex parte Roney* [1892] 61 LT 270, CA, a letter of complaint in the statutory form against a solicitor in respect of his professional conduct was held to be protected by absolute privilege in defamation proceedings. Likewise here, the impugned letter written by the first defendant is also protected by absolute privilege.

## The Defence Of Justification

**[18]** The gist or the sting of the alleged libel in the present appeal is this. That the plaintiffs had misled the sessions court judge in regard to the "nature of the second plaintiff's occupation."

**[19]** The learned High Court judge failed to properly appreciate that the alleged libel was based on two distinct charges. The first charge revolved on the fact that the plaintiffs had knowlingly misled and/or lied to the sessions court judge that the second plaintiff was a clerk in the first plainttif's office. The second charge concerned the fact that the plaintiff's had continued to mislead the sessions court judge although the first defendant had suggested to the sessions court judge that the second plaintiff may have been an Advocate and Solicitor or a pupil in chambers.

**[20]** In regard to the first charge, the learned High Court judge failed to properly appreciate that:

(i) the plaintiffs had admitted that the second plaintiff was never personally employed by the first plaintiff and from their own witness statements, the plaintiffs were at pains (a) to emphasise that the second plaintiff was at the material time employed as a clerk in the offices of the Council of Justices of the Peace, Negeri Sembilan, and (b) to deny that the second plaintiff was personally employed by the first defendant; and

(ii) the witness statement of Ms. Lee Kwye Lan marked as D2 showed that there was no one by the name of Mr. Alvinthiren Nair (the second plaintiff) employed in Dato' Ramalingam's (the second plaintiff's) office and that Ms. Lee Kwye Lan was the sole employee in the office premises and her answers led to the irresistible conclusion that the second plaintiff was not employed in the said office premises.

**[21]** Now, in regard to the second charge, the learned High Court judge also failed to properly appreciate that the plaintiffs could have informed but failed to inform the sessions court judge on 13 August 1999 that the second plaintiff had completed his pupillage and was awaiting his admission as an Advocate and Solicitor – in response to the first defendant's suggestion to the sessions court judge that the second plaintiff may have been an Advocate and Solicitor or a pupil in chambers.

**[22]** For these reasons, the learned High Court judge ought to have held that both the first and the second charges were justified.

**[23]** It is the law that justification, or truth, is an absolute defence for an action in libel or slander (*Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor* [1977] 3 LNS 2).

**[24]** It is also the law that no action lies in regard to a statement which injures the reputation of another if that statement is true (*Meeran Leebaik Maullin & Anor v. J Mohamed Ismail Marican & The Straits Printing Works* [1926] 2 MC 85).

**[25]** But if the allegations are false, then the maker will have to face the music. In such a situation no amount of good faith, or honest belief in their truth will enable the maker to raise the defence of justification (*S. Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233, SC).

**[26]** However, if the libel contains defamatory statements both of fact and of opinion the defendant, raising a plea of justification, must prove that the statements of opinion are correct (*Cooper v. Lawson* [1838] QBD, Michaelmas Term 8 A. & D. 601; and *Howden v. "Truth" And "Sportsman" Limited And Another* [1937] 58 CLR 416).

**[27]** Lord Finlay in *Sutherland And Others v. Stopes* [1925] AC 47, HL, at pp. 62 to 63 correctly described the defence of justification in these trenchant terms:

> Such a plea of justification means that the libel is true not only in its allegations of fact but also in any comments made therein. ... the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

**[28]** While Lord Shaw of Dunfermline in *Sutherland And Others v. Stopes (supra)*, at p. 75, explained the defence of justification in this way:

> ... in a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true.

**[29]** According to the case of *Alexander v. The North Eastern Railway Co.* [1865] 6 B. & S. 340, if the defendant can prove that the main charge or gist of the libel is true, a slight inaccuracy in one or more of its details will not prevent the defendant from succeeding in a defence of justification.

**[30]** Now, in the context of the present appeal, the defence of justification should succeed because the defendants were able to establish the truth of either one of the charges referred to earlier and that would be that the plaintiffs had misled the sessions court judge about the second plaintiff's occupation.

**The Defence Of Qualified Privilege**

**[31]** The learned High Court judge rejected this defence on the ground that the publication of the impugned letter was activated by malice.

**[32]** In the plaintiffs' reply to the defendants' defence, the particulars of malice were pleaded in its original Malay language text in this way (see p. 89 of the appeal record at vol. 1):

**Butiran Niat Buruk Dan/Atau Niat Jahat**

(a) Plaintif mengulangi perenggan 13(b), (c), (d), (e) Pernyataan Tuntutan bahawa pada masa yang material Defendan Pertama sebagai pihak dirinya sendiri dan/atau bagi pihak Defendan Kedua dalam pengetahuan bahawa Plaintif Kedua telah tamat guamannya.

(b) Bahawa Defendan Pertama yang bertindak sebagai Peguamcara untuk Tan di kes Saman No: 52-19989-99 telah menyalahgunakan kesempatannya sebagai Peguamcara apabila beliau menulis dan menerbitkan tuduhan-tuduhan fitnah yang dashyat, palsu dan bisa terhadap Plaintif-Plaintif untuk motif yang tidak baik supaya anakguam Defendan-Defendan (Tan) akan menang kes Saman No: 52-19989-99 dan martabat Defendan Kedua akan ditingkatkan sambil mengakibatkan martabat dan reputasi Plaintif-Plaintif dirosakkan.

**[33]** As an officer of the court, the first defendant had an avowed duty to prevent the administration of justice from being imperilled and brought into disrepute. The first defendant too had a personal or professional interest in preserving the integrity of the administration of justice. The first defendant honestly believed that the second plaintiff was a pupil in chambers and not a clerk in the first plaintiff's office. It is said that the first defendant was merely acting in accordance with a sense of duty as an officer of the court by publishing the impugned letter. It is also said that the absence of any allegation of ill will or spite on the part of the first defendant towards the plaintiffs reinforces the defendants' case and leads to the irresistible inference that the first defendant had no improper or indirect motive for publishing the impugned letter.

**[34]** In the context of the law of defamation, what is the meaning of the word "malice"? It refers to a particular state of mind (*Roberts v. Bass* [2002] HCA 57; *Renouf v. Federal Capital Press of Australia Pty. Ltd.* [1977] 17 ACTR 35 at 56; *Nevill v. Fine Arts and General Insurance Company, Limited* [1895] 2 QB 156, CA, at 169; and *Watt v. Longsdon* [1930] 1 KB 130 at 154) and a striking example would be ill will or spite towards a plaintiff that gives rise to the publication for an improper or foreign purpose or without an honest belief in the truth of the publication (*Webb v. Bloch* [1928] 41 CLR 331 at 368; *Horrocks v. Lowe* [1975] AC 135, HL, at 149 to 151; *Barbaro v. Amalgamated Television Services Pty Limited* [1984] NSW Lexis 2333; and *Bruton v. Estate Agents Licensing Authority* [1996] 2 VR 274 at 296). And the publication by itself must have been actuated by malice. In short, malice must be the operative factor at

the time of the making of the publication (*Lange v. Australian Broadcasting Corporation* [1997] 145 ALR 96; *Oldfield v. Keogh* [1941] 41 SR (NSW) 206 at 214; and *Mowlds v. Fergusson* [1939] 40 SR (NSW) 311 at 327 to 329).

**[35]** Lord Diplock in *Horrocks v. Lowe (supra)*, at p. 151 had this to say about qualified privilege:

> Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found.

**[36]** The evidence reveals that the first defendant had carried out inquiries on the second plaintiff at the Bar Council and had asked Mr. Woodhull (DW2) to call the first plaintiff's office in order to verify whether the second plaintiff worked there. It was based on those inquiries that the first defendant formed the honest belief that the plaintiffs had misled and/or lied to the sessions court judge about the second plaintiff's occupation.

**[37]** On the available evidence, the first defendant acted on an honest belief in the truth of the publication. The first defendant did not act with reckless indifference to the truth or falsity of the publication. For this varied reasons, the learned High Court judge ought to have held that the defence of qualified privilege should succeed.

## The Defence Of Fair Comment

**[38]** This is the defence to an action of libel or slander in that the words complained of are fair comment on a matter of public interest. To succeed in this defence, the defendants must show that the words are fair comment and not a statement of fact. There are *dicta* to the effect that fair comment is not defamatory (*Campbell v. Spottiswoode* [1863] 122 ER 3 B. & S. 769).

**[39]** The defendants too must show that there is a basis for the comment to the extent of indicating that what is being stated is fair comment. And, finally, the defendants must also show that the comment is on a matter of public interest.

**[40]** In an action for libel where the plaintiff sues more than one defendant, the plaintiff must prove express malice against each of them (*Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 – approving vigorously Lord Denning MR in *Egger v. Viscount Chelmsford & Ors* [1965] 1 QB 248 at 265), [1964] 3 All ER 406, CA). It is wrong to assume that the malice of one defendant infects his co-defendant. Of course, each defendant is answerable severally and jointly for the joint publication. But each defendant is entitled to raise several defences in his favour whether he is sued jointly or separately from the other defendants.

**[41]** According to Lord Nicholls in *Tse Wai Chun Paul v. Albert Cheng* [2000] HKCFA 86; [2001] EMLR 31:

> The rationale of the defence of fair comment is different, and is different in a material respect. It is not based on any notion of performance of a duty or protection of an interest. As already noted, its basis is the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives. In the nature of things the instances of misuse of privilege highlighted by Lord Diplock (for example, 'some private advantage unconnected with the duty or interest which constitutes the reason for the privilege') are not necessarily applicable to fair comment.

**[42]** I have said earlier that the defence of fair comment is confined to comment on matters of public interest. And matters of public interest are far and wide. Lord Denning MR in *London Artists Ltd. v. Littler, Grade Organisation Ltd. v. Same, Associated Television Ltd. v. Same, Grade v. Same* [1969] 2 QB 375, CA at 391 aptly said on what constitutes matters of public interest:

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

**[43]** Now, it bears repetition to say that the gist or sting of the impugned letter would be that the plaintiffs had knowingly misled and/or lied to the sessions court judge that the second plaintiff was a clerk in the first plaintiff's office and that the plaintiffs had continued to mislead the sessions court judge although the first defendant had suggested that the second plaintiff may have been an Advocate and Solicitor or a pupil in chambers.

**[44]** From the available evidence, the defence of fair comment should be invoked in favour of the defendants for the following reasons:

(i) that the charges on which the alleged libel was based were true and that the alleged libel was made fairly;

(ii) that the alleged libel constituted a comment and not a statement of fact;

(iii) that the alleged libel was made fairly even if only one of the charges had been proved to be true. In this connection reference to s. 9 of the Defamation Act 1957 should be made. It reads as follows:

> **Fair comment.**
>
> 9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

(iv) that the alleged libel was made by the first defendant in the honest belief that it was true; and

(v) that the alleged libel was not activated by malice.

**[45]** For the reasons adumbrated above, the defendants' appeal must succeed.

**KN Segara JCA:**

**[46]** The appeal before us arises after a full trial in the High Court of a defamation/libel suit instituted by the respondents (plaintiffs) against the appellants (defendants) as a consequence of a letter dated 13 August 1999 (the Impugned Letter) written by the 1st defendant to the 1st plaintiff and copied to the Sessions Court Judge. The Impugned Letter will be reproduced shortly in this judgment. The learned trial judge found in favour of the plaintiffs for general damages in the sum of RM100,000 each and costs. We unanimously allowed this appeal by the defendants.

**[47]** The 1st appellant (1st defendant) was admitted as an advocate & solicitor of the High Court in Malaya on 2 November 1996 and was at all material times a legal assistant in the 2nd appellant (2nd defendant) firm of Messrs A. Zahari Kanapathy Thulasi (the firm).

**[48]** The 1st respondent (1st plaintiff) was at all material times a commissioner for oaths and also held various honorary positions in public bodies including, as President of the Association of Commissioners for Oaths, the Honorary Secretary of the Council of Justices of the Peace Negeri Sembilan and the Secretary General of the National Council of the Justices of the Peace Malaysia. His office address was at No. 106, 1st Floor Jalan Yam Tuan, Seremban, Negeri Sembilan.

**[49]** The 2nd respondent (the 2nd plaintiff) worked as a temporary clerk in a legal firm in Petaling Jaya from 1994 to 1998. In the course of working in the legal firm, as a temporary clerk, he got to know the 1st plaintiff and did work for him personally. He collected documents and sent them to the 1st plaintiff in Seremban. He also collected documents from Seremban and sent them to various places, as instructed by the 1st plaintiff. During that period of employment as a temporary clerk in the legal firm in Petaling Jaya (1994-1998), he also filed documents on behalf of the 1st plaintiff in court. With reference to 1st plaintiff's relationship with the 2nd plaintiff, the 1st plaintiff had testified under cross-examination, *inter alia*:

> The 2nd plaintiff is personally known to me as a law student and he was constantly visiting me in Seremban and sometimes staying at Seremban.
>
> … I used to pay him money in the form of *ex-gratia* for the work done for the day. For example, sometime it is RM100; sometimes it is RM50; sometimes it could be more. RM200. This also includes travelling expenses.

**[50]** From 30 August 1998 till 30 July 1999 the 2nd plaintiff did his pupilage under his master Ganeswaren a/l Doraisamy from the firm of Ganeswaren Mustafa & Chow at No 251-A Taman Bunga Melor, Jalan Meru, Klang, Selangor, as evidenced by the "Sijil Kerajinan" dated 31 July 1999 issued by the master for the purposes of the Petition for Admission as an Advocate & Solicitor by the 2nd plaintiff. On 20 August 1999 the 2nd plaintiff was admitted as an Advocate & Solicitor of the High Court Malaya.

**[51]** On 25 August 1999 the 2nd plaintiff made a short statutory declaration (the significance and relevance of which would be adverted to later) as follows:

(1) I have been appointed as a Partner in THANA & PARTNERS of No 14-B, 2nd Floor, Jalan Istana, 41000 Klang, Selangor Darul Ehsan, which maintains its Client's Account … Selangor.

(2) From 30th October 1998 to 30th July 1999, I was undergoing my period of pupilage and I was called to the Bar on 20th August 1999.

(3) From **2nd August 1999 to 19th August 1999**, I was attached as a **clerical assistant** with the Council of Justices of the Peace, Negeri Sembilan at J. P. Secretariat, No. 106 1st Floor Jalan Yam Tuan, 70000 Seremban Negeri Sembilan.

(4) I was not employed from 20th August 1999 to 24th August 1999.

Affirmed by:

25 Aug 1999.

**[52]** There is a voucher No 0392 dated 30/8/99 (marked exh. P1) which reads:

**Voucher**

Council Of Justices Of The Peace Negeri Sembilan

106, 1st Floor, Jalan Yam Tuan, 70000 Seremban, N. S. D. K.
Tel:06-712215 & 06-723390. Fax: 06-727135

Dr. To Mr Alvinthiren Nair a/l Onikanadan Nair (i/c 720129-08-6067) Date: 30/8/99

| PARTICULARS | Amount |
|---|---|
| Special Allowance in assisting updating JP's inventory in respect of JP's newly appointed JP's for the year 1996,1997 &1998 working period **2nd August - 18th August 99** | $300.00 |

Approved by …

Received the sum of Ringgit Malaysia …

**[53]** We hold, without hesitation, that the 2nd plaintiff's statutory declaration asserting that he was attached as a clerical assistant with the Council of Justices Of the Peace, Negeri Sembilan from 2 August 1999-19 August 1999, and the fact that a special allowance of RM300 was approved on 30 August 1999 (as per the voucher) for assisting in updating the JPs lists, does not sustain or justify any assertion that on 13 August 1999, the 2nd plaintiff's occupation was "clerk", be it in the office of the 1st plaintiff personally, the Council of Justice of Peace Negeri Sembilan, the National Council of Justice of Peace Malaysia or J.P. Secretariat. It would be an insult to the intelligence of any ordinary reasonable person (and in the absence of any cogent and incontrovertible evidence) that a legally qualified person, who had successfully completed his pupilage, and on the threshold of being called to the Bar very shortly, would be prepared to accept the job of a clerk, without any formal offer of the terms and conditions (in particular, the salary) of that employment.

**[54]** Special allowance, as per the voucher dated 30 August 1999, does not equate to salary or employment and occupation as a clerk. In the context of this case, *vide* the issue of the 2nd plaintiff's occupation of "clerk" on 13 August 1999, the plaintiff's assertion in para. 3 of his statutory declaration, dated 25 August 1999, is a mere after thought (in the light of what had happened at the Sessions Court, Seremban on 13 August 1999), bereft of any proof.

**[55]** Under cross-examination, the 1st plaintiff testified:

> Q: When did you 1st employ the 2nd plaintiff?
>
> A: Sometime in the beginning of August 1999.
>
> Q: Did you give him any letter of appointment?
>
> A: No.
>
> Q: Did you discuss with him the terms and conditions of his employment?
>
> A: No.
>
> I did not employ the 2nd plaintiff. He was employed by the Council of Justice of the Peace, Negeri Sembilan, on an ad-hoc basis.

**[56]** We hold without hesitation that the 2nd plaintiff was not employed either by the 1st plaintiff or the Council of the Justice of the Peace, Negeri Sembilan or the Council of Justice of Peace Malaysia or the J.P. Secretariat as a clerk, at any time and, in particular on 13 August 1999. There was no cogent and convincing evidence before the trial court, other than the bare assertions of the plaintiffs.

**[57]** The 1st plaintiff's testimony under cross-examination that the 2nd plaintiff was not employed by him, but by the Council of the Justice of the Peace, Negeri Sembilan, on an ad-hoc basis, completely demolishes the truth of the statement by the 2nd plaintiff to the Sessions Court Judge on 13 August 1999 that his occupation was "Kerani di pejabat Dato Rama" which was officially recorded by the Sessions Judge. Such testimony reinforces the defendants' assertion that the plaintiffs had misled the Sessions Judge. In any event, there was neither documentary nor oral evidence from the Council of the Justices of the Peace Negeri Sembilan that the 2nd plaintiff was employed on an ad-hoc basis, throwing at large the issue of the credibility of 1st and 2nd plaintiffs on the question of the occupation of the 2nd plaintiff on 13 August 1999.

**[58]** The trial judge had seriously misdirected himself on the facts in the context of the events that had transpired in the Sessions Court immediately before the Impugned Letter was written. The trial judge had not subjected the evidence before him to critical examination and evaluation as to whether the plaintiffs had in fact misled the Sessions Court Judge on 13 August 1999 as to the nature of the 2nd plaintiff's occupation on 13 August 1999. We are unanimous that a serious miscarriage of justice has been occasioned by the trial judge in rejecting the pleaded defence of justification to the alleged libel contained in the Impugned Letter.

**[59]** The Firm (Messrs A. Zahari Kanapathy Thulasi) was retained by one Dato' Tan Chin Woh (Dato Tan) to commence legal proceedings against the 1st plaintiff for the recovery of a friendly loan of RM92,000. Pursuant to Dato Tan's instructions, the Firm filed civil proceedings against the 1st plaintiff in the Sessions Court, Kuala Lumpur *vide* Summons No. 7-52-19989-99.

**[60]** The 1st plaintiff was not represented by solicitors in the Sessions Court. He filed an application to strike out Dato Tan's summons and statement of claim. The application was fixed for hearing on 13 August 1999. The 1st defendant appeared as counsel on behalf of Dato Tan and informed the Sessions Court Judge that he would be raising a preliminary objection to the application.

**[61]** From the outset, on 13 August 1999, the 1st and 2nd plaintiff were seated at the Bar table in the Sessions Court. The 2nd plaintiff was wearing a white shirt, a tie and a black jacket – the standard professional attire for counsel appearing in court. The 2nd plaintiff was seated in the 2nd row of the Bar table, behind the 1st defendant who was seated in the 1st row.

**[62]** At this juncture, it is pertinent to emphasize that the 2nd plaintiff had already completed his pupilage on 30 July 1999 and was waiting to be called to the Bar at the High Court Kuala Lumpur on 20 August 1999. However, this fact was not known to the 1st defendant or to the Sessions Court Judge. Judicial notice should be taken that under s. 12(2) Legal Profession Act 1976 (LPA), no qualified person shall without special leave in writing of the Bar Council hold any office or engage in any employment during his pupilage. It is also to be noted that pursuant to s. 36(2) LPA, upon obtaining the order of a judge, a pupil may be permitted to appear in court on behalf of his Master or of the firm in which his Master is practicing.

**[63]** In the course of the 1st plaintiff's oral submissions, on the preliminary objection made by the 1st defendant as counsel for Dato Tan, the 2nd plaintiff assisted the 1st plaintiff by handing over copies of authorities to the Sessions Court Judge and the 1st defendant (as counsel for Dato Tan). The copies of the authorities intended for the Sessions Court Judge were handed by the 2nd plaintiff through the 1st defendant to the court interpreter. The 2nd plaintiff nudged the 1st defendant and gestured to the 1st defendant to hand over copies of the authorities to the court interpreter. The 1st defendant obliged him a few times.

**[64]** After about 15 minutes, the 1st defendant was curious as to the presence of the 2nd plaintiff, as the 2nd plaintiff was not a party in the proceedings before the Sessions Court Judge. The 1st defendant got up from his seat and addressed the court. He requested the Sessions Court Judge to query the 2nd plaintiff as to his identity, and to have his presence recorded since the 1st plaintiff was on record as acting in person.

**[65]** Now, according to the 1st defendant, the 1st plaintiff hastily rose and informed the Sessions Court Judge that the 2nd plaintiff was a clerk in his office. The 1st defendant then suggested to the Sessions Court Judge that the 2nd plaintiff may be either an advocate and solicitor or a pupil in chambers (quite rightly, as the 2nd plaintiff was attired in a white shirt, a tie and a black jacket, seated at the Bar table, handing over authorities, as if he were learned counsel). The 1st defendant requested the Sessions Court Judge to seek the 2nd plaintiff's identity card.

**[66]** The Sessions Court Judge then requested the 2nd plaintiff for his identity card and proceeded to record his particulars. When the Sessions Court Judge asked the 2nd plaintiff as to his occupation, the 2nd plaintiff hesitated and turned to the 1st plaintiff who murmured "clerk". The 2nd plaintiff then informed the Sessions Court judge that he was a clerk in the 1st plaintiff's office. The Sessions Court Judge directed him to vacate from the Bar table. Thereafter, the submissions on the preliminary objection continued and the Sessions Court Judge reserved her decision in respect of the preliminary objection to 16 August 1999.

**[67]** When the case at the Sessions Court finished, at about 11am on 13 August 1999, the 1st defendant went over to the office of the Bar Council, which was located next to the court, to check on the status of the 2nd plaintiff. He was informed by an officer at the counter that the 2nd plaintiff was not a member of the Malaysian Bar but was according to their records a pupil in chambers with Mr Ganeswaren Doraisamy of Messrs. Ganeswaren Mustafa & Chow, Klang. Thereafter, upon his return to the firm's office, the 1st defendant obtained the assistance of his colleague in the Firm, one Mr. Woodhull, to telephone the 1st plaintiff's office to ascertain the position of the 2nd plaintiff in the 1st plaintiff's office.

**[68]** At about 3.09pm, on 13 August 1999, Mr. Woodhull telephoned the 1st plaintiff's office and spoke to one Ms Lee (Lee Kwye Lan) and asked her whether Alvinthiren worked there. She replied "No such person working here". She also confirmed that it was Ramalingam's office. The 1st defendant then wrote the letter, dated 13 August 1999 (Impugned Letter), to the 1st plaintiff and copied same to the Sessions Court Judge, to place on record the events of 13 August 1999, as he believed he had a duty to do so as an officer of the court. He honestly believed the contents of the letter were true. The Impugned Letter reads:

A. Zahari Kanapathy Thulasi

13th August 1999

Dato' M Ramalingam Fax/Post

.....

Dear Sir,

**Re: Kuala Lumpur Sessions' Court Summons No: 7-52-19989-1998**

**Dato' Tan Chin Woh -vs- Dato'Yalumallai @ M. Ramalingam s/o Muthusamy**

We refer to the above matter which is fixed for decision of our preliminary objection to your application on 16/08/99.

We would like to place on record the following facts and occurrences in Court this morning:-

a) that an individual by the name of Alvinthiren Nair a/l Onikandan Nair was seated next to you in Court and assisting you throughout the proceedings;

b) when our solicitor Mr Ashok Kandiah, urged the Court to query the individual's identity and his locus to be present and seated at the Bar table, you informed the Court that he was a clerk in your office;

c) our Mr Ashok Kandiah then urged the Court to record the individual's presence in Court and for a ruling that a clerk not be permitted to be seated at the Bar table. The learned Judge then requested the individual Mr Alvinthiren for his identity card and expressly asked him for his occupation, to which Mr Alvinthiren replied that he was a clerk at your office. The learned Judge then directed Mr Alivinthiren to remove himself from the Bar table;

d) we have checked with the Bar Council who have confirmed that the said Mr Alvinthiren is a pupil in the chambers of one Mr. Ganeswaran Doraisamy of Messrs. Ganeswaran Mustafa & Chan, Klang;

In view of the matters aforesaid, we wish to express regret with the following:

a) that Mr Alvinthiren should not have been seated at the Bar table when he had no locus to do so;

b) that you and Mr Alvinthiren had knowingly misled the Court and/or lied to the Court that Mr. Alvinthiren was a clerk at your office. You and Mr. Alvinthiren had continued to mislead the Court although our Mr. Ashok Kandiah had suggested to the Court that Mr Alvinthiren may have been an advocate and solicitor or a pupil in chambers;

c) that you could have informed the Court that Mr Alvinthiren was a pupil in chambers and not proceeded in the matter which you did;

As we view the above matters seriously, we are mindful to lodge a complaint with the Bar Council on Mr Alvinthiren's conduct in Court this morning and we shall also proceed to inform the Court that Mr Alvinthiren and you had misled the Court on the nature of Mr Alvinthiren's occupation. We shall urge the Court to take the necessary action that it deems fit against Mr Alvinthiren and you.

We also wish to inform you that we had this afternoon called your office and a clerk in your office confirmed with us that Mr Alvinthiren is not in your employ, and that the same clerk had informed us that there is no such person by the name of Alvinthiren in your office.

Yours faithfully,

for and on behalf of

Messrs A. Zahari Kanapathy Thulasi

S. Ashok Kandiah

c.c. Hakim Mahkamah Sesyen Faks/Serahan Tangan

**[69]** We are unanimous that the 1st defendant was fully justified in writing the Impugned Letter, viewed in the context and circumstances under which it was written. The events in the Sessions Court and the Impugned letter speak for itself.

**[70]** The learned trial judge was correct in holding that when justification is pleaded, the burden is on the defendants to show the court that they are justified in making the allegation. He was also correct when he stated:

In the context of the present case, this can only be done by showing to the court that the plaintiffs had in fact lied to the Sessions Judge. In order to prove that both plaintiffs had lied to the Court as to the 2nd plaintiff's occupation, it is incumbent upon the defendants to prove on a balance of probabilities that the 2nd plaintiff was not a clerk at the 1st plaintiff's office.

**[71]** Nevertheless, the trial judge has failed to appreciate that in a civil case, one party's evidence is the other's as well. So, a defendant may rely on the plaintiff's evidence to prove that he has misled or lied to the Sessions Judge. The trial judge fell into serious error when he held:

> This, the defendants have failed to do. On the contrary, the evidence points to the fact that the 2nd plaintiff was indeed a temporary clerk at the 1st plaintiff's office, as he was employed as a temporary clerk at the Secretariat of the Justice of the Peace Council, Seremban. That Secretariat was the office of the 1st plaintiff, located at the 1st floor, 106 Jalan Yam Tuan, Seremban. I find there is no basis for the 1st defendant to find fault as to what the plaintiffs had told the Sessions Court Judge as to the 2nd plaintiff's occupation.

**[72]** The trial judge failed to appreciate that the sting in the Impugned Letter is in the words:

> (i) that you and Mr Alvinthiren had knowingly misled the Court and/or lied to the Court that Mr Alvinthiren was a clerk at your office; and
>
> (ii) we shall proceed to inform the Court that you had misled the Court on the nature of Mr. Alvinthiren's occupation.

**[73]** We are unanimous that the trial judge failed to appreciate that on the evidence before him the "sting" was fully justified. That the plaintiffs had knowingly misled the Court as to the nature of Mr. Alvinthiren's occupation on 13 August 1999 is patent and obvious from the following irrefutable facts:

1) Mr Alvinthiren had completed his pupilage on 30 July 1999 and, knew or ought to have known that his Petition for Admission as an Advocate & Solicitor was fixed for hearing at the High Court Kuala Lumpur on 20 August 1999.

2) Immediately upon his completion of his pupilage on 30 July 1999, Mr Alvinthiren had not reverted to his former employment as a clerk in the legal firm he had worked immediately prior to his pupilage, pending his admission as an advocate & solicitor.

3) Mr Alvinthiren did not have any personal matter, or business relating to the Justice of Peace Council, Negeri Sembilan, in the Sessions Court, Seremban on 13 August 1999 to justify his attendance in the court.

4) On 13 August 1999 Mr Alvinthiren was attired in a white shirt, a tie and black jacket(the traditional counsel's attire in court) and was seated at the Sessions Court Bar table, next to Dato' Ramalingam, who was on record as acting in person in respect of a civil action, brought against him by one Dato Tan.

5) On 13 August 1999 Mr Alvinthiren was assisting Dato' Ramalingam in the proceedings before the Sessions Court Judge.

6) At the very outset of the proceedings, Mr. Alvinthiren had not identified himself as a clerk/officer from the Justice of Peace Council, Negeri Sembilan and sought leave from the Sessions Court Judge to be seated next to Dato' Ramalingam, to assist him in the proceedings that morning.

**[74]** We are confident that had Mr Alvinthiren informed the Sessions Court Judge right from the outset, on 13 August 1999, that he had in fact already completed his pupilage and was currently waiting to be called to the Bar on 20 August 1999, any request to be seated next to Dato Ramalingam could have been readily granted. If Mr. Alvinthiren had been frank and honest with the court as to the nature of his role that morning, right from the outset, he would not have faced the embarrassment and ignominy of being relegated to the public gallery of the court as the events unfolded that morning, in the course of submissions by the parties. Most certainly, Mr Alvinthiren has misled the court (by his smart counsel's attire, seated at the Bar table confidently handing over authorities to the court and counsel) into believing that he was either a pupil in chambers or an advocate and solicitor. The situation was aggravated when he alleged his occupation was "kerani di pejabat Dato Rama".

**[75]** We are unanimous that the trial judge failed to consider the witness statement marked D2, that is, the affidavit of Lee Kwye Lan, who was listed as one of the plaintiffs' witness and her "Jawatan" stated as "Kerani Council, Council of Justice of Peace, Negeri Sembilan". She was, however, not called by the plaintiffs to testify and, the irresistible inference is that her evidence would have demolished the 2nd plaintiff's assertion to the Sessions Court Judge that he was a clerk at the 1st plaintiff's office. The trial judge also failed to consider the evidence of Mr. Woodhull, whose evidence,

A together with the witness statement of Lee Kwye Lan, marked as exh. D2, would have established on a balance of probability, if not beyond reasonable doubt, that the 2nd plaintiff was not employed as a temporary clerk at the 1st plaintiff's office or at the Secretariat of the Justice of the Peace Council Negeri Sembilan.
B Exhibit D2 reads:

Affidavit

I, Lee Kwye Lan …

C **Witness Statement**

1 Q: Do you recall having received any telephone call from anyone on or about 13/8/1999 enquiring of a Mr Alventhiren Nair.

A: Yes

D

2 Q: Did the caller identify himself?

A: No

3 Q: What was he wanting to know?

E A: He was wanting to know of Mr Alventhiren Nair whether he is in the employ of Dato' Ramalingam's office.

4 Q: What was your answer?

F A: My answer was that there was no such person employed in the office.

5 Q: What was your reason for saying this?

A: The reason was simply because in the Office, I am the sole employee as Secretary of Dato Ramalingam.

G

Affirmed by

Lee Kwye Lan

This plaintiff's witness statement … is filed by …

H **[76]** In the above circumstances, we are unanimous that the defence of justification must prevail, as the truth of the sting has been established by the irrefutable evidence in court. The trial judge was clearly wrong in his finding of fact and his failure to critically

I

examine the evidence in its totality.

**[77]** The appeal is accordingly allowed, with costs to the appellants, fixed at RM25,000 here and below. The order of the High Court Judge is set aside. All sums of money paid by the defendants to the plaintiffs are to be repaid with interest at 8% per annum. Deposit refunded to appellants.